83-2002

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH M. HOUGHTON,
Petitioner

v.

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY, KEYSTONE INSURANCE COMPANY, BENJAMIN E. ZUCKERMAN, ESQUIRE and DEAN B. STEWART, JR., ESQUIRE,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THOMAS C. BRANCA, ESQUIRE
Suite 504
One Montgomery Plaza
Norristown, PA 19401
(215) 279-5500
Attorney for Petitioner, Joseph M. Houghton

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

21 pp

QUESTION PRESENTED FOR REVIEW

Under the "public function theory", does not a litigant and/or attorney who invoke the subpoena power act for the State since it is the State, not the litigant or attorney, which is compelling the attendance and thus, does not the misuse and abuse of that subpoena power to invade Constitutionally-protected rights to privacy create a valid cause of action under 42 U.S.C. §1983?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—(*Continued*)

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH M. HOUGHTON,

Petitioner

v.

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY, KEYSTONE INSURANCE COMPANY, BENJAMIN E. ZUCKERMAN, ESQUIRE and DEAN B. STEWART, JR., ESQUIRE,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Joseph M. Houghton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 14, 1984.

OPINIONS BELOW

Memorandum Opinion of the Court of Appeals, unreported, appears in the Appendix hereto. The Order and Memorandum Opinion rendered by the District Court for the Eastern District of Pennsylvania, unreported, also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 14, 1984, and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is evoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

> "§1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
>
> R.S. §1979; Pub.L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284."

STATEMENT OF CASE

This case involves the misuse and abuse of subpoena power by lawyers for insurance companies to secure highly-sensitive medical records, including psychiatric records and photographs of petitioner, a non-party to a disputed claim for injuries arising from an automobile accident.

This case is presently before this Court from the affirmance by the Court of Appeals of the dismissal of petitioner's civil rights' action by the District Court under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and as such, all disputed facts were taken in the light most favorable to the petitioner.

One, John J. Cassidy, sued the Prudential Property & Casualty Insurance Company and Keystone Insurance Company, in state court for injuries which he suffered in an automobile accident. Houghton was not a party to the Cassidy actions nor a claimant or eyewitness, as he was not in the vehicle nor at the scene of the Cassidy accident. Nevertheless, in the course of contesting Cassidy's claim, the insurance company attorneys issued subpoenas for Houghton's medical records to a physician and chiropractor who, under threat of contempt, produced those records. The records were reviewed, copied and disseminated. Houghton was unaware of the attempt to obtain his records until they were already in the hands of the insurance companies. The records included information, psychiatric report and photographs of Houghton which were highly sensitive, personal, confidential and of an embarrassing nature.

The sole issue upon which the District Court based its dismissal and upon which the Court of Appeals passed judgment, was whether use of the state subpoena process is sufficient "state action" to state a cause of action under 42 U.S.C. §1983.

REASONS FOR GRANTING THE WRIT

I.

DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND THIS COURT HOLDING THAT SUBPOENA POWER IS THAT OF THE STATE.

The Third Circuit's decision that the use of the state subpoena process does not sufficiently implicate state action is at odds with the Second Circuit's decision in *United States v. Wiseman*, 445 F.2d 792 (2nd Cir.), *cert. den'd.*, 404 U.S. 967, 92 S.Ct. 346, 30 L.Ed.2d. 287 (1971), the validity of which has been recognized by the Fourth Circuit in *Wilkins v. Rogers*, 581 F.2d 399, 405 (4th. Cir. 1978), and repeatedly recognized in subsequent decisions of, the Second Circuit, and District Courts of New York, Pennsylvania and Ohio: *Taylor v. Consolidated Edison Co. of New York, Inc.*, 552 F.2d 39, 42 (2nd. Cir. 1977); *Ruffler v. Phelps Memorial Hosp.*, 453 F.Supp. 1062, 1067-1068 (S.D. New York 1978); *Timson v. Weiner*, 395 F.Supp. 1344 (S.D. Ohio, E.D. 1975); *Carrasco v. Klein*, 381 F.Supp. 782, 785 (E.D. New York 1974); *Isaacs v. Bd. of Trustees of Temple Univ., Etc.*, 385 F.Supp. 473, 485 (E.D. Pa. 1974), all of which acknowledge the *Wiseman* decision as an example of the application of the "public function theory"[1] to actions of private individuals.

In *Wiseman*, the defendants were charged with violation of 18 U.S.C. §242[2], which is the criminal counter-

---

1. The "public function theory" is firmly entrenched in §1983 law. *Rendell-Baker v. Kohn*, ____U.S.____, 102 S.Ct. 2754 (1982); *Jackson v. Metropolitan-Edison Co.*, 419 U.S. 345, 95 S.Ct. 449 (1974); *see, also, Weisman v. Sherry*, 514 F.Supp. 728 (1981) (recognizing that federal courts have applied the public function doctrine to private actions in a variety of contexts).

2. It is clear that the synonymous standards of "color of state law" and "state action" are also synonymous standards as used in the context of 18 U.S.C. §242 and the concept under 42 U.S.C. §1983. *Lugar v. Edmondson Oil Co.*, ____U.S.____, 102 S.Ct. 2744, at 1249, n. 9 (1982); *Blum v. Yaretsky*, ____U.S.____, 102 S.Ct. 2777 (1982).

part of 42 U.S.C. §1983. The *Wiseman* defendants were *privately employed* process servers convicted of fraudulently completing and filing Affidavits of Service. The Second Circuit Court of Appeals was faced with the specific question of whether state action existed. The Court found state action under the "public function theory":

> "Unlike most functions involved in the conduct of a lawsuit by private parties, the service of summons is essentially and traditionally a public function. . . . that the defendants sought to take advantage of their authority to perform this 'act of public power' by signing blank affidavits of service without actually effecting service does not remove their activities from the 'public' classification . . . [T]o violate Section 242, an act need not have been made in compliance with law but merely 'under color of law'. . . .
>
> Accordingly, we conclude that the activity involved in this case is activity which even when performed by a private party constitutes a 'public function', and constitutes state action under that theory." 445 F.2d 792 at p. 795.

Four years later, in *Timson v. Weiner*, *supra*, the *Wiseman* rationale was applied in a civil action under 42 U.S.C. §1983. In that case, a decision arising from defendant's motion to dismiss for lack of state action, plaintiff alleged that he was served with a subpoena by a private attorney, (who had requested and was granted sequestration of witnesses at a public hearing for the State Personnel Board of Review), maliciously and with the intent of preventing plaintiff from attending that public hearing. In short, plaintiff alleged deprivation of a constitutional right through the use of a subpoena. The district court, based on the public function theory as applied in *Wiseman*, found the requisite state action:

> "A subpoena is the order of an arm of the state compelling the presence of a person under threat of

> contempt. . . . *That the state traditionally grants litigants and their attorneys the privilege of invoking the subpoena power does not alter the fact that it is the state, not the litigant or his attorney, which is compelling the attendance. . . . The litigant or attorney who invokes the subpoena power acts for the state. Id.* at pp. 1347, 1348 and 1349. (Emphasis added).

Notwithstanding these numerous decisions applying the "public function theory" to the use of the subpoena power, and the obvious conflict between those decisions and the instant decision of the Court of Appeals, the Court of Appeals did not address those cases presented to them. The district court, however, addressed those decisions, doubting their precedential value in light of this Court's decisions in *Lugar v. Edmondson Oil Co., Inc., supra,* and *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149 (1978).

The Third Circuit's decision also ignored and at least implicitly conflicts with this Court's recent decision in *Juidice v. Vail,* 430 U.S. 327, 97 S.Ct. 1211 (1977). Implicit in this Court's holding that the federal court should abstain in an action to enjoin as unconstitutional, New York statutory provisions authorizing contempt for failure to respond to a subpoena requiring a judgment-debtor to attend a deposition in aid of satisfaction of the judgment, was the recognition by this Court that the use of the subpoena and its correlate contempt power are indeed state functions:

> "The contempt power lies at the core of the administration of a state's judicial system, *cf. Ketchum v. Edwards,* 153 N.U. 534, 539, 47 N.E. 918, 920 (1897). Whether disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of a contempt of court, is labeled civil, quasi-criminal, or criminal in nature, we think that the salient fact is that federal-court interference with the state's contempt process is 'an offense to the state's

> interest . . . likely to be every bit as great as it would be were this a criminal proceeding.' (citation ommitted). Moreover, such interference with the contempt process . . . 'unduly interfere(s) with legitimate activities of the Stat[e],' [citation ommitted)". *Id.*, 97 S.Ct. at p. 1217.

There can be little doubt that the subpoena power is only that of the state, and that the use of that subpoena power even by a private individual is "state action". Until a definitive statement is issued by this Court clearly establishing that the use of subpoena power constitutes state action for purposes of the Civil Rights' Act, there remains the unequal application of the sanctions, both criminal and civil, provided for under the Civil Rights' Act involving basic Constitutional rights[3] in an area which touches upon a substantial portion of the United States citizenry, namely, those involved in litigation in state courts. The issue presented is so basic and pervasive to our legal system of justice, that a definitive decision is needed now.

II.

SINCE STATES UNIFORMLY ALLOW UNBRIDLED ACQUISITION OF STATE SUBPOENAS BY LITIGANTS AND THEIR ATTORNEYS AS A PRACTICAL NECESSITY TO PROVIDING AN EXPEDITIOUS AND EFFECTIVE FORUM FOR LITIGATION OF LEGAL DISPUTES, THIS COURT MUST UNEQUIVOCABLY ESTABLISH THAT THE USE OF STATE SUBPOENAS IS

---

3. There is little doubt that the right to privacy is constitutionally protected. *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965), and that the right to privacy in medical records not only falls within the constitutional privacy rights, but indeed on a higher plane. See, *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570 at p. 577 (3rd. Cir. 1980), . . . "information concerning one's body has a special character."

STATE ACTION SUBJECTING THE USERS OF THOSE SUBPOENAS TO ACCOUNTABILITY FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS THROUGH THE USE OF THOSE SUBPOENAS.

The practice followed in the instant case where subpoenas of the Commonwealth of Pennsylvania are obtained simply by purchasing them from the Prothonotary of the local county Court of Common Pleas, is undoubtedly the common practice throughout the courts of the states of the United States and indeed, even of the federal district courts. The Third Circuit noted that petitioner did not challenge below that the state statute authorizing the subpoena power was unconstitutional; however, there would seem to be no basis upon which such a challenge could be leveled. It seems obvious that the state's interest in providing its citizens with an expeditious and effective forum to litigate disputes must, as a practical necessity allow the unbridled acquisition of such subpoenas by entrusting the litigants and their attorneys with this substantial state power. Indeed, it would seem incongruous to an effective and expeditious forum for litigation to require prior judicial intervention in order to obtain such subpoenas, particularly in light of the overcrowded dockets throughout the courts of the states. Moreover, it would seem that such a challenge would be prohibited by this Court's decision in *Juidice v. Vail, supra,* prohibiting federal interference with the state's legitimate activities in exercising their subpoena and contempt powers. It is not the obtaining of these subpoenas that demands this Court's judicial intervention, but the misuse of those subpoenas once obtained, to violate a citizen's constitutionally-protected rights that requires this Court's judicial guidance. It is our citizen's ever-growing erosion of their valued rights to privacy that needs to be protected. The potential for misuse of the state's subpoena power to deprive one's Constitutional rights of privacy, liberty, property, speech

and due process of law, such as in the instant case, *Wiseman supra*, and *Timson, supra*, are readily apparent. To allow such deprivation of civil rights through state action go unredressed, contrary to the mandates of the Civil Rights' Act, specifically 42 U.S.C. §1983, would be tantamount to sanctioning a private state police force embodied with investigative powers beyond the reach of the United States Constitution and the Civil Rights' Act.

The use of the subpoena power permeates civil and criminal proceedings throughout, and involve paramount Constitutional rights. It is now time to halt the Constitutional abuse of that subpoena power and to forewarn all that may seek to invoke the strong arm of the state compelling the presence of a person or records or other tangible things, or both, under threat of contempt, that they do so knowing they will be held accountable under the Civil Rights' Act for a violation of a person's rights through the misuse of that subpoena power.

CONCLUSION

For all the reasons herein stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS C. BRANCA

Attorney for Petitioner, Joseph M. Houghton

Office Address
Suite 504
One Montgomery Plaza
Norristown, PA 19401
(215) 279-5500

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1395

JOSEPH M. HOUGHTON,

Appellant

v.

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY, KEYSTONE INSURANCE COMPANY, BENJAMIN E. ZUCKERMAN, Esquire, and DEAN B. STEWART, JR., Esquire,

Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
C.A. No. 83-1273
District Judge: Charles R. Weiner

Submitted Under Third Circuit Rule 12(6)
January 23, 1984

Before: ADAMS and GARTH, *Circuit Judges*, and BROTMAN, *District Judge**

(Filed March 14, 1984)

MEMORANDUM OPINION OF THE COURT

ADAMS, *Circuit Judge*.

---

* Honorable Stanley S. Brotman, United States District Court for the District of New Jersey, sitting by designation.

This case involves the alleged abuse of subpoena power by lawyers for insurance companies to secure the medical records of Joseph Houghton, a non-party to a disputed claim for injuries arising from an automobile accident.

a.

John Cassidy sued the Prudential Property & Casualty Insurance Company and the Keystone Insurance Company in state court for injuries which he suffered in an automobile accident. Cassidy was treated by a physician and chiropractor and in the course of defending the claim the insurance companies subpoenaed them both for depositions along with their records. Joseph Houghton, the plaintiff here, was not involved in any manner with cassidy except that Houghton had the same treating physician and chiropractor. Houghton did not have a claim against the insurance companies, was not a witness to any of the underlying facts concerning Cassidy's accident, and was not in any other sense associated with the Cassidy claim. Nevertheless, in the course of contesting Cassidy's claim, the insurance company attorneys secured subpoenas for Houghton's medical records, obtained the records and then had the records copied.

Houghton asserts that he was unaware of the attempt to obtain his records until they were already in the hands of the insurance companies. The defendants contend that this is untrue and that Houghton's attorney had been informed of their interest in the records, but had failed to move the state court to quash the subpoenas. Because the district court dismissed Houghton's action under Rule 12(b)(6) of the Federal Rules of Civil Procedure, we must take all disputed facts in the light most favorable to the plaintiff. Accordingly, the sole issue before this Court today is whether the claimed abuse of the subpoena process is sufficient to state a cause of action under 42 U.S.C. §1983.

b.

There is no doubt that Houghton's allegations, if proved, would establish a cause of action under state law, but a different question is presented in a §1983 suit. In a §1983 suit, a plaintiff has the burden of alleging not simply tortious conduct, but that such conduct was under color of state law. *United States v. Classic*, 313 U.S. 299, 326 (1941) ("misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with with the authority of state law"). In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932 (1982), the Supreme Court noted that conduct satisfying the state action requirement of the Fourteenth Amendment would also suffice for a §1983 cause of action. The question in this appeal is, therefore, whether the alleged abuse of the state subpoena process sufficiently implicates state action or is sufficiently under color of state law so as to survive a motion to dismiss.

Because the alleged deprivation of Houghton's rights was not the action of state officials, plaintiff bears the burden of establishing that the private action of the attorneys for the insurance companies was "fairly attributable" to the state. Under *Lugar* this is accomplished through a two-pronged test:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

457 U.S. at 937.

The first prong of this test is satisfied by the use of the subpoena power to deprive Houghton of what he claims to be constitutionally recognized privacy rights. The second prong, however, is where Houghton's claim falters. There is no allegation that the attorneys for the insurance companies acted in concert with or in a conspiracy with state officials, *see Adickes v. Kress & Co.*, 398 U.S. 144 (1970), that the state statute authorizing the subpoena power is unconstitutional either on its face or as applied, *see Lugar*, 457 U.S. at 952, or that there was in existence at the time the subpoenas were obtained a pattern or practice of private enlistment of state officials to accomplish impermissible ends, *see Cruz v. Donnelly*, No. 81-5070, slip op. at 6 (3d Cir., Feb. 10, 1984). Without such allegations, the claims of state involvement are not sufficient to state a cause of action under §1983.

For the foregoing reasons, the judgment of the district court is hereby affirmed.

TO THE CLERK:

Kindly file the foregoing opinion.

_____

Circuit Judge

Dated:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH HOUGHTON	:	
	:	
	:	
v.	:	C.A. NO. 83-1273
	:	
	:	
PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY	:	
KEYSTONE INSURANCE COMPANY,	:	
BENJAMIN E. ZUCKERMAN, ESQUIRE AND DEAN B. STEWART, JR., ESQUIRE	:	

ORDER

WEINER, *J.* MAY 31, 1983

AND NOW, this 31st day of May, 1983, it is hereby ORDERED that:

1. Defendants' motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) are GRANTED since, taking as true the allegations in the complaint, I find that the misuse or abuse of the subpoena power of the state is not action "under color of state law" within the mean of 42 U.S.C. §1983. See *Lagar v. Edmonson Oil Co., Inc.*, ____U.S.____, 102 S.Ct. 2744, 2756-57 (1982) ("[V]alid cause of action under §1983 [stated] insofar as [petitioner] challenged the constitutionality of the Virginia [prejudgment attachment] statute; he did not, insofar as alleged only misuse or abuse of the statute."); *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 160 n. 10 and 164-65 (1978); *Earnest v. Lowentritt*, 690 F.2d 1198, 1200 (5th Cir. 1982); *Folsom Inv. Co., Inc. v. Moore*, 681 F.2d 1032, 1037 (5th Cir. 1982); *Lindley v. Amoco Production Co.*, 639 F.2d 671, 673 (10th Cir. 1981); *Chicarelli v. Plymouth Garden Apts.*, 551 F.Supp. 532, 538 (E.D. Pa. 1982). To the extent that *United*

States v. Wiseman, 445 F.2d 792 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971) and *Timson v. Weiner*, 395 F.Supp. 1344 (S.D. Ohio 1975) suggest a contrary conclusion, I note that the precedential value of those decisions is seriously undermined by *Lagar* and *Flagg Bros., supra.*

2. Defendants' motions for attorney's fees pursuant to 42 U.S.C. §1988, 28 U.S.C. §1927 and Fed.R.Civ.P. 11 are DENIED because, in light of the foregoing precedent, I find that there has not been a sufficient showing that the action was frivolous, unreasonable without foundation, or vexatious within the meaning of those statutes.

Accordingly, the above-captioned action is dismissed with prejudice and costs shall be taxed against the plaintiff pursuant to Fed.R.Civ.P. 54(d).

IT IS SO ORDERED.

CHARLES R. WEINER

No. 83-2002

IN THE

Supreme Court of the United States

October Term, 1983

JOSEPH M. HOUGHTON,

Petitioner,

vs.

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY, KEYSTONE INSURANCE COMPANY, BENJAMIN E. ZUCKERMAN, ESQUIRE and DEAN B. STEWART, JR., ESQUIRE,

Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

H. ROBERT FIEBACH
HENRY L. SHRAGER
WOLF, BLOCK, SCHORR
AND SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, PA 19102

Attorneys for Respondent, Benjamin E. Zuckerman, Esquire

HUGH J. HUTCHISON
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor Packard Building
Philadelphia, PA 19102

Attorneys for Respondents, Keystone Insurance Company and Dean B. Stewart, Esquire

JAMES C. BOWEN
ANITA F. ALBERTS
POWER, BOWEN & VALIMONT
102 North Main Street
Doylestown, PA 18901

Attorneys for Respondent, Prudential Property & Casualty Insurance Company

Batavia Times Publishing Co.
Edward W. Shannon
Philadelphia, Pa. (215) 232-8181

Counterstatement of Question Presented

Whether the mere allegation of the abuse or misuse of the state subpoena process by private litigants and their attorneys, without also claiming either that these litigants and attorneys acted in concert with state officials, that there existed a practice of private enlistment of state officials to accomplish impermissible ends or that the state statute authorizing the subpoena power is unconstitutional either on its face or as applied, sufficiently implicates state action so as to invoke federal jurisdiction under 42 U.S.C. §1983 and thereby survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

TABLE OF CONTENTS.

Page

TABLE OF CITATIONS.

Cases:

Page

Statutes and Other Authorities:

IN THE

Supreme Court of the United States

October Term, 1983

No. 83-2002

JOSEPH M. HOUGHTON,

Petitioner,

vs.

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY, KEYSTONE INSURANCE COMPANY, BENJAMIN E. ZUCKERMAN, ESQUIRE and DEAN B. STEWART, JR., ESQUIRE,

Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The judgment of the Court of Appeals, affirming the decision and order of the District Court, is found in Petitioner's appendix at pages A-1 through A-4.

The opinion of the District Court is found in Petitioner's appendix at pages A-5 through A-6.

Counterstatement of the Case

A. Procedural History

On June 7, 1982, Petitioner, Joseph M. Houghton, filed suit in the Court of Common Pleas of Montgomery County, Pennsylvania, captioned *Joseph Houghton v. Prudential Property & Casualty Insurance Co., Keystone Insurance Co., Avis Insurance Co., Temple Insurance Co., Benjamin E. Zuckerman, Esquire, Dean B. Stewart, Jr., Esquire, James C. O'Connor, Esquire and Robert M. Ruzzi, Esquire*, C.A. #82-7891, asserting various invasion of privacy counts against these insurance carriers and their counsel for subpoenaing and disseminating certain of his medical records which were claimed to be confidential and highly sensitive in nature. That state court action is presently pending.

Subsequently, on March 16, 1983, Houghton filed a Complaint in the United States District Court for the Eastern District of Pennsylvania, which is the subject of this Petition for a Writ of Certiorari. The Complaint, directed against two of the insurance carriers and their respective attorneys named in the state court action, is based upon the same facts set forth in that prior lawsuit but seeks relief under 42 U.S.C. §1983 for allegedly depriving Houghton of his federal constitutional rights.

Defendants filed motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, citing, among other grounds, that the Complaint failed to state a cognizable cause of action under 42 U.S.C. §1983. By Order dated May 31, 1983, the Honorable Charles R. Weiner granted the motions to dismiss. On appeal, the Honorable Arlin M. Adams, writing for a unanimous three judge panel of the Court of Appeals for the Third Circuit, affirmed the judgment of the District Court in a memorandum opinion issued March 14, 1984. This Petition for a Writ of Certiorari followed.

B. Factual Background

For purposes of this brief, Respondents adopt the statement of facts set forth in the opinion of the Third Circuit which appears at pages A-1 through A-4 of the Appendix in the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

A. The Opinion Of The United States Court Of Appeals For The Third Circuit Was Eminently Correct Since Petitioner Fails To State A Claim Cognizable Under 42 U.S.C. §1983.

Because the Fourteenth Amendment of the Constitution is directed at the states, it can only be violated by conduct that may be fairly characterized as "state action" rather than acts of private persons or entities. *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764 (1982). Thus, 42 U.S.C. §1983 provides a remedy for the deprivation of rights secured by the constitution and laws of the United States when that deprivation takes place under color of any statute, ordinance, regulation, custom or usage of any state or territory. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 102 S.Ct. 2744 (1982).

The Third Circuit affirmed the judgment of the District Court holding that Petitioner had failed to establish that the private action of the attorneys or the insurance companies was "fairly attributable" to the state under the two-pronged test articulated by this Court in *Lugar*:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state. Without a limit such as this, private parties

> could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

102 S.Ct. at 2754.

Petitioner argues that because the use of the state subpoena power constitutes the exercise of a rule or privilege created by the state, the lower courts erred in denying a cause of action under §1983 for the alleged deprivation of his constitutional rights through the improper use of such subpoenas. While the Third Circuit concluded and Respondents therefore concede that the use of the state subpoena power does satisfy the first prong of the *Lugar* test, Petitioner's argument goes no further in establishing the existence of state action.

The test for alleging a cognizable state action claim under §1983 includes a second step as well so as to limit causes of action to those areas clearly intended by Congress. Many of our daily activities are governed, either directly or indirectly, by the exercise of a right or privilege created by the state or by a rule of conduct imposed by the state. If each of these activities, without more, were to be a potential source of a §1983 civil rights claim, our courts would be flooded with constitutional litigation. As this Court observed in *Lugar*, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." 102 S.Ct. at 2754.

This second prong of the two-tiered *Lugar* state action test embodies several disjunctive requirements, any one of which will satisfy the second test. Nevertheless, Petitioner has totally ignored this second step of the *Lugar* test, thereby rendering his claim fatally defective. Petitioner has never alleged either in the Courts below or before this Court that the attorneys or the insurance

companies either acted in concert with or in conspiracy with state officials or that there was in existence at the time the subpoenas were obtained a pattern or practice of private enlistment of state officials to accomplish impermissible ends. Rather, Petitioner's sole contention is that the mere alleged abuse or misuse of the subpoenas by the private attorneys or their clients constituted state action. However, an allegation of improper use of state procedures by private actors alone is insufficient to plead a civil rights claim under §1983. *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729 (1982).

Having failed to even discuss much less meet either of these requisite elements of the second part of the *Lugar* test, alternatively, Petitioner must challenge the constitutionality of the state statute or procedure authorizing the subpoena power to invoke federal jurisdiction under §1983. *Lugar*, 102 S.Ct. at 2757. Petitioner readily admits that he failed to do so.[1] Further, he even concedes that there is no basis upon which to invoke such a challenge to the procedure for obtaining pre-trial discovery subpoenas.

---

[1] Petitioner incorrectly suggests that *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211 (1977) would prohibit such a constitutional challenge in the federal court to the state's legitimate exercise of its subpoena and contempt powers. On the contrary, *Juidice* is consistent with *Lugar* and the Third Circuit's decision below. *Juidice*, a federal abstention case held that litigants "... need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings, *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697 (1973), and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate". 97 S.Ct. at 1218. The exception to this abstention doctrine occurs when it is alleged and proved that the state is enforcing the contempt procedures in bad faith or is motivated by a desire to harass. Since Petitioner did not assert such a claim, the District Court properly abstained from assuming jurisdiction under the doctrines of federalism and comity enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200 (1975), *reh'g denied*, 421 U.S. 971, 95 S.Ct. 1969 (1975).

> It is not the obtaining of these subpoenas that demands this Court's judicial intervention, but the misuse of those subpoenas once obtained, to violate a citizen's constitutionally protected rights that requires this Court's judicial guidance. (Petition for Writ of Certiorari, page 8).

The conduct of which Petitioner complains cannot be ascribed to any governmental decision. Therefore, by limiting his claim in the Complaint, the appeal before the Third Circuit and this Petition for Certiorari to only the alleged misuse of the subpoenas, without an allegation of joint participation by a state actor, and further, without a constitutional challenge to the relevant state procedure, Petitioner has failed to state a claim sufficient to invoke federal jurisdiction under §1983. *Lugar v. Edmondson Oil Co., Inc., supra.*

The issue presented by Petitioner required nothing more than the routine application of this Court's mandate in *Lugar*, which was correctly analyzed and decided by the Third Circuit in affirming the judgment of the District Court.

B. The Decision Of The Third Circuit Does Not Conflict With The Decisions Of This Court Or Any Other Courts Of Appeals.

Most significantly, Petitioner does not contend that the Third Circuit deviated from this Court's state action standard set forth in *Lugar.* In fact, Petitioner curiously avoids any discussion whatsoever of the second part of the two-pronged *Lugar* test. Rather, Petitioner cites *United States v. Wiseman*, 445 F.2d 792 (2nd Cir. 1971), *cert. denied*, 404 U.S. 967, 92 S.Ct. 346 (1971) as his sole support for the proposition that under the "public function theory" the use of a pre-trial discovery subpoena by a private litigant constitutes state action for purposes of a §1983 claim.

The public function theory is not a separate and independent state action test to be applied to the exclusion of the mandate by this Court. Rather, it is applied in conjunction with the *Lugar* analysis, thereby requiring either a claim that a state actor participated in the alleged misconduct, or a constitutional challenge to the state's procedural rules. *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777 (1982). By ignoring this analysis, Petitioner refuses to recognize the development of the law and the decisions of this Court since *Wiseman, supra*, was decided thirteen years ago.[2]

Additionally, those courts of appeals which have considered post-*Lugar* §1983 claims have uniformly rejected those cases which attack only the actions by private parties under a valid state statute rather than the constitutionality of a prohibitory one. *See, Higbee v. Starr*, 698 F.2d 945 (8th Cir. 1983); *Earnest v. Lowentritt*, 690 F.2d 1198 (5th Cir. 1982). Most recently, in *Barnard v. Young*, 720 F.2d 1188 (10th Cir. 1983), a case strikingly similar factually to the instant case, the United States Court of Appeals for the Tenth Circuit, applying *Lugar*, specifically held that the conduct of a private attorney who employed the subpoena *duces tecum* power of the State of Oklahoma to obtain an opposing party's medical records could not be chargeable to the state under 42 U.S.C. §1983.

---

[2] Petitioner cites *Timson v. Weiner*, 395 F.Supp. 1344 (S.D. Ohio, E.D. 1975), another pre-*Lugar* decision, in support of the *Wiseman* "public function theory" rationale. For the reasons stated above, its precedential value is seriously undermined. Moreover, *Timson* has never been adopted within its own circuit by the United States Court of Appeals for the Sixth Circuit.

Nor is Petitioner correct in stating that the Second Circuit espouses a conflicting position. *Wiseman* considerably predates *Lugar* and its progeny. Therefore, at the time of its decision, the Second Circuit was not bound by the *Lugar* mandate, which controls the issue presented here. Moreover, not only does *Lugar* and its progeny implicitly overrule *Wiseman* for the proposition cited by Petitioner but, since the *Wiseman* decision, the Second Circuit has neither applied that holding to decide a subsequent §1983 claim nor has it had an opportunity to decide a similar question post-*Lugar*. However, in *International Society for Krishna Consciousness, Inc. v. Air Canada, et al.*, 727 F.2d 253 (2nd Cir. 1984) (decided on other grounds), the Second Circuit has specifically recognized "... the complex of criteria elucidated and elaborated in the array of cases including *Lugar v. Edmondson Oil Co.*, ...", 727 F.2d at 254, which must be considered in resolving allegations of state action under §1983. Accordingly, because the Second Circuit has not reached a dispositive post-*Lugar* decision on the issue presented by Petitioner which rejects or refuses to apply the analysis mandated by this Court, there is in fact no conflict to be resolved.

Moreover, upon careful scrutiny, none of the other cases cited by Petitioner (all of which pre-date *Lugar* as well) expressly adopts the *Wiseman* holding. *Wilkins v. Rogers*, 581 F.2d 399 (4th Cir. 1978), actually questions the holding of the case stating only that process servers "may" commit state action in carrying out their duties. *Wilkins*, 581 F.2d at 405. The other cases cited by Petitioner also fail to follow *Wiseman: Taylor v. Consolidated Edison Co. of New York, Inc.*, 552 F.2d 39 (2nd Cir. 1977), *cert. denied*, 434 U.S. 845, 98 S.Ct. 147 (1977) (*Wiseman* applies only where the process server acts arbitrarily); *Ruffler v. Phelps Memorial Hospital*, 453 F.Supp. 1062 (S.D.N.Y. 1978), identifies *Wiseman* as

a case cited for the proposition that the public function theory has been "recognized and discussed"); *Carrasco v. Klein*, 381 F.Supp. 782 (E.D.N.Y. 1974) (implies that *Wiseman* might say that "sewer service" could be regarded as a public function); *Isaacs v. Board of Trustees of Temple University, et al.*, 385 F.Supp. 473 (E.D. Pa. 1974), (cites *Wiseman* for the proposition that Courts have found state action in a broad spectrum of factual situations).

Since Petitioner has failed to demonstrate the existence of any conflict within the circuits, a necessary ingredient on which Petitioner relies for granting the Petition is wanting.

C. The Issues Raised By Petitioner Are Not Sufficiently Important To Warrant Review By This Court.

Petitioner has failed to demonstrate any special or important reasons for this Court's review of the judgment below. The dismissal of the Complaint was fully consistent with the relevant decisions of this Court as well as the application of those principles by other circuit courts of appeals, and did not involve any unsettled question of federal law.

Moreover, the state court affords appropriate remedies to prevent either the potential invasion of privacy rights during pre-trial discovery, *i.e.*, a motion to quash the subpoena, or alternatively, provides the mechanism for redress after the alleged abuse has occurred by instituting suit in the state court for the invasion of privacy, as this Petitioner has already done. Therefore, no useful purpose would be served by further review of the judgment entered below since an appropriate forum is available to resolve the identical pending claim.

D. The Result Urged By Petitioner Would Improperly And Unnecessarily Expand Federal Court Jurisdiction.

Finally, extending petitioner's argument to its logical conclusion would create chaos in the federal court system. Permitting parties to invoke federal jurisdiction whenever a private litigant in a state court allegedly uses the state court process improperly either in the commencement of suit, or during suit in the discovery process, as is alleged here, or in any other activity prescribed under state statute or procedure, without either obtaining the aid of a state official or challenging its constitutionality, would open the floodgates to duplicitous and harassing litigation. Such a departure from the existing law would improperly and unnecessarily expand federal court jurisdiction to areas where Congress never intended it to exist. Accordingly, there is simply no need for a re-examination of the issue by this Court.

Conclusion

For all of the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

H. ROBERT FIEBACH
HENRY L. SHRAGER
WOLF, BLOCK, SCHORR and
SOLIS-COHEN
Twelfth Floor, Packard Building
Philadelphia, Pennsylvania 19102
Attorneys for Respondent,
Benjamin E. Zuckerman, Esquire

HUGH J. HUTCHISON
OBERMAYER, REBMANN, MAXWELL
& HIPPEL
14th Floor Packard Building
Philadelphia, Pennsylvania 19102
Attorneys for Respondents,
*Keystone Insurance Company**
and Dean B. Stewart, Esquire

JAMES C. BOWEN
ANITA F. ALBERTS
POWER, BOWEN & VALIMONT
102 North Main Street
Doylestown, Pennsylvania 18901
Attorneys for Respondent,
Prudential Property & Casualty
*Insurance Company***

---

* Keystone Insurance Company is a wholly owned subsidiary of Keystone Automobile Club.

** Prudential Property & Casualty Insurance Company is a subsidiary of Prudential Insurance Company of America. The subsidiaries of Prudential Property & Casualty Insurance Company are Prudential General Insurance Co. and Prudential Commercial Insurance Co.